

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [REDACTED] Office: Texas Service Center

Date: MAR 10 2003

IN RE: Petitioner: [REDACTED]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act,
8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER: [REDACTED]

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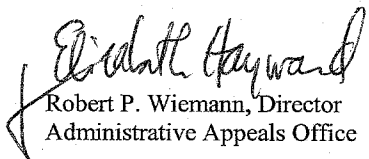
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds.

On appeal, counsel argues that the petitioner is actively in the process of investing the required amount of capital.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, K.N.A., LLC, not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is \$1,000,000. K.N.A., LLC operates a gas station with an attached convenience store and Blimpie Subs and Salad restaurant.

INVESTMENT OF CAPITAL

8 C.F.R. § 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

* * *

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between

the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

- (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
- (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
- (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
- (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
- (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner indicated on the petition that he initially invested \$868,500 on February 2, 2001 and had invested a total of \$1,024,705.55 as of the date of filing, May 25, 2001. The business plan reflects that it was prepared for "potential lenders and to assist in raising debt capital and

bridge financing in the amount of approximately \$700,000 for Phase I." The business plan indicates that the equity and debt financing would be used as follows:

Acquisition cost	\$850,000
Closing cost	\$10,000
Financing costs	\$8,500

Total acquisition cost	\$868,500
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Rehab/addition cost:

New Chevron signage	\$31,180
New pumps	\$40,781
Remodeled and expand C-store	\$150,000

Other Projects Costs:

Blimpie's franchise	\$18,000
Inventory and working capital	\$75,000

Total project cost	\$1,183,461
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A subsequent cost projection is similar, but includes a higher projection for remodeling and franchise costs, amounting to a total of \$1,245,480. The petitioner submitted an agreement for gas supply with Chevron and a proposal to install Chevron pumps for \$40,781. The petitioner also submitted a November 8, 2000 franchise agreement with Blimpie Subs and Salads requiring an initial fee of \$5,000, advertising fees of three percent of weekly gross sales, and continuing franchise fees of six percent of weekly gross sales. The petitioner also agreed to spend at least \$2,000 on a grand opening promotion. In addition, the petitioner submitted the February 2, 2001 settlement statement for the purchase of an abandoned gas station at 10900 Courthouse Road in Spotsylvania, Virginia. The settlement document reflects that the petitioner owed \$842,020, \$353,020 of which was paid from an "initial draw from lender (of total const. loan amt. of \$800,000.)"

In addition, the petitioner submitted an agreement for a construction loan of \$600,000. The agreement references a separate security agreement that the petitioner did not provide. Finally, the petitioner submitted a balance sheet for K.N.A. reflecting the following equity:

Opening Bal Equity	1,014,285.51
Partner One Equity	
Partner One Investment	14,000.00
Partner One Equity – Other	4,178.65
Total Partner One Equity	18,175.65




Partner Two Equity	5,000
Purchase new asset	-437,652.15
Retained Earnings	-84,118.90
Net Income	-36,588.05
 Total Equity	 479,105.06

We simply note here that this balance sheet is questionable. A balance sheet shows a company's financial position at the end of an accounting period. *See* Barron's Dictionary of Accounting Terms 41 (3d ed. 2000). It is not a statement of cash flows, which reflects transactions during a defined period. *See id.* at 414. A partner's equity is generally only reduced by distributions and a percentage of any loss. A reduction due to the purchase of an asset should not result in a change in equity (net worth) as it would normally be reflected within assets as a decrease in cash and an increase in tangible assets.

In his request for additional documentation, the director requested the security agreement relating to the \$600,000 loan. In response, the petitioner asserted that he financed the purchase of the location of his business with \$458,116.80 of business funds and \$353,020 of loan proceeds. In addition, the petitioner claimed to have spent \$86,780 on gas pumps, \$100,000 on renovations, \$30,000 on equipment, \$30,000 on Blimpie, and \$55,000 on a future pizza and chicken restaurant. The petitioner also listed several future projects and asserted that K.N.A. obtained another \$800,000 loan.

The petitioner also submitted deeds of trust for the initial \$600,000 reflecting that the loan was secured by the business property in addition to his own property as well as the loan and security documentation for a February 14, 2002 loan for \$800,000 also secured by the assets of K.N.A. In addition, the petitioner submitted receipts for state sales taxes paid by K.N.A., invoices for improvements to the Blimpie restaurant site amounting to \$3,722.21, invoices for improvements to the gas station amounting to \$23,844.69, invoices and an explanatory letter from Anderson Oil company regarding \$86,780 for remodeling of the gas station, and a construction contract with Sutherland Construction dated June 29, 2001, for \$238,265. The petitioner also submitted a proposal from Sutherland for additional development options, but this proposal is dated May 31, 2001, prior to the signed contract. Finally, the petitioner submitted K.N.A.'s 2001 tax return. The tax return reflects that K.N.A. began business in 1999. The return further reflects that K.N.A. began the year with \$535,451 in partner capital accounts, received \$263,336 in contributed capital that year, and distributed \$21,866. K.N.A. also started the year with \$474,558 in cash and no mortgages, and ended the year with \$14,425 in cash and \$581,113 in mortgages. During the year, K.N.A. increased its buildings and other depreciable assets from \$4,354 to \$1,148,577. The petitioner's Schedule K-1 reflects beginning capital of \$534,965, a contribution of \$258,336, a loss of \$169,762, and a withdrawal of \$18,866. The Schedule K-1 for the petitioner's wife reflects beginning capital of \$486, a contribution of \$5,000, a loss of \$1,715, and withdrawals of \$3,000. While the ultimate numbers match, the balance sheet as of December 31, 2001, reflects the following equity breakdown:

Partner One Equity



Partner One Draws	-\$18,865.90
Partner One Investments	\$606,048.51
Partner One Equity – Other	\$199,144.65
Total Partner One Equity	\$786,327
Partner Two Equity	
Partner Two Investments	-\$2,394
Partner Two Equity – Other	\$5,000
Total Partner Two Equity	\$2,606

The director noted that the petitioner could not include the loan secured partially by the assets of the new commercial enterprise and determined that the petitioner had not demonstrated a qualifying investment.

On appeal, counsel concedes that the \$600,000 loan cannot be considered part of the qualifying investment, but asserts that the petitioner has spent more than \$600,000 in starting up the business. Counsel argues that the petitioner need only be actively in the process of investing the required amount.

The petitioner submits several subcontractor invoices for improvements to the gas station. It is not clear, however, whether these costs were included in the main contract with Anderson Oil Company.

While counsel is correct that a petitioner need only be actively in the process of investing, 8 C.F.R. § 204.6(j)(2) requires that all the funds be fully committed. The record contains no evidence that, at the time of filing, the petitioner had placed any funds in an irrevocable escrow account or that he had issued a secured promissory note for any amount to the new commercial enterprise. Nor does the record even reflect a detailed plan as to how those funds would be spent. While the petitioner appears to be expanding the new commercial enterprise, he borrowed an additional \$800,000 in February 2002. As such, the petitioner has not established that he is committed to personally financing any future expansions.

It is clear that K.N.A. has incurred start-up expenses beyond those financed through loans. The sales tax expenses are normal operating expenses paid from proceeds, and cannot be considered. The petitioner, however, purchased the property for \$842,020, only \$353,020 of which was financed with the construction loan. As such, the remaining \$489,000 is a potential capital investment. In addition, the new business spent \$3,722.21 on improvements to Blimpie, \$23,844.69 for improvements to the gas station, \$86,780 for remodeling of the gas pumps, and \$238,265 for construction, for a total of \$352,611. Counsel calculates the number to be \$323,345.18 as the petitioner had not fully paid the construction contract amount in 2001. Regardless, the petitioner has not established that these amounts were not at least partially covered by the remaining \$246,980 of the loan amount (\$600,000 in loan proceeds minus \$353,020 towards the property purchase). Subtracting the remaining loan proceeds (\$246,980)

from the \$352,611 expended by the business, only \$105,631 remains as a potential capital investment. The \$489,000 from the property purchase plus the remaining \$105,631 in expenses amounts to a possible investment of \$594,631, less than two-thirds of the requisite investment amount.

The tax returns do not evidence a larger investment. On appeal, counsel references \$300,000 allegedly invested by the petitioner in 2001 to make up for the company's net loss in its first year of operation. The tax returns, however, reflect that in 2001, the petitioner and his wife only contributed an additional \$263,336. The capital account at the beginning of 2001 was \$535,451. The company, however, was formed in 1999. Without the Schedule K-1s from previous years, it is not clear how much of the company's capital accounts was contributed as capital. Even if we accepted that the entire \$535,451 represented the petitioner's capital investment, the additional \$263,336 minus the withdrawals of \$21,866 reflects an infusion of only \$776,921. As stated above, the petitioner has not demonstrated that any funds, let alone the remaining \$223,079, are fully committed to the new commercial enterprise.

The record also remains absent that the petitioner is the source of any invested funds. This issue, however, will be discussed in more detail below.

SOURCE OF FUNDS

8 C.F.R. § 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 201, 210-211 (Comm. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 22 (E.D. Calif. 2001)(affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

Initially, the petitioner submitted a loan application on which he indicated that he had \$500,000 on hand, \$400,000 in marketable securities, \$100,000 in overseas securities, \$580,000 in real estate and \$150,000 in personal property. Later on the application, however, the petitioner indicated that he had \$8,115 in personal accounts and \$537,500 in business checking and money market accounts. Finally, the petitioner indicated that he received \$11,200 annually from the Embassy of Yemen.

The petitioner submitted personal bank and investment statements reflecting \$371,853.83 in assets as of January 2001. The petitioner claimed an additional \$29,327.61 in an account with Datek, but the account holder for that account is the new commercial enterprise and the statement reflects a balance of \$30,059.31.

The petitioner also submitted several bank statements and credit advices for a checking account and money market account held by K.N.A. LLC at SunTrust Bank (previously Crestar Bank). The credit advices reflect that Mohamed N. Al-Rowaishan, in care of the petitioner, transferred \$12,000 to K.N.A. on June 22, 2000, VA Legal Services transferred \$261,159.16 to K.N.A.'s checking account, number 2029922675, on June 2, 2000, and Gary W. Lonergan Ltd. transferred \$262,391.70. The bank statements for checking account number 202992675 reflect an additional credit of \$100,000 on June 22, 2000 and several additional smaller credits from unknown sources. On June 7, 2000, K.N.A. transferred \$250,000 from account 202992675 into money market account 702322806. K.N.A. transferred an additional \$210,000 from account 202992675 to 702322806 on August 3, 2000. K.N.A. transferred smaller (five digit) amounts between the two SunTrust accounts between June and December 2000. As of January 31, 2001, K.N.A. had \$457,478 in the money market account and \$3,572.86 in the checking account.

In his request for additional documentation, the director concluded that the evidence did not establish the path of the funds from the petitioner to K.N.A. and that the petitioner had not demonstrated how he accumulated the funds in his personal account.

In response, the petitioner asserted that he obtained his funds through the sale of real estate. He submitted settlement documentation for the sale of real estate in May 2000 for \$277,305.60 and in August 2000 for \$280,000. Both properties were sold by K.N.A., not the petitioner personally.

The director reiterated his concerns regarding the lack of evidence tracing the path of the allegedly invested funds and concluded that the petitioner had still not demonstrated the source of the funds in the K.N.A. accounts.

On appeal, counsel asserts that the petitioner realized \$523,50.91 from the sale of property and received an additional \$500,000 from his father in gifts. The petitioner resubmits the settlement documentation for K.N.A.'s sale of two properties and documentation of wire transfers from November 1994 through July 2001 to the petitioner's personal account from Mohammed Tareb, [REDACTED] another account belonging to the petitioner. Funds transferred by the petitioner to himself cannot demonstrate the ultimate source of those funds. The petitioner submitted an affidavit from Nagi Alrowaishan claiming to be the petitioner's father and attesting to providing gifts to the petitioner of \$20,000 monthly from 1990 to 1993 and \$800,000 after 1993.

As stated above, the only large sums of money traceable into K.N.A. consist of \$262,391.70 on August 12, 2000 from Gary W. Lonergan, Ltd., \$12,000 from Mohamed N. Al-Rowaishan in care of the petitioner on June 22, 2000, and \$261,159.16 from VA Legal Services on June 2, 2000. The petitioner has not demonstrated his relationship with any of these entities such that we can conclude that this money represents the petitioner's personal investment.

Moreover, the petitioner's explanation for the source of his funds is insufficient. The properties sold belonged to K.N.A., not the petitioner. The petitioner has not established where K.N.A. obtained the funds to purchase the properties in the first place. If it obtained the funds from the petitioner, the petitioner must demonstrate where he obtained the funds.

Further, not all of the money wired to the petitioner derived from his alleged father. The petitioner has not established the relationship between himself and [REDACTED]

Finally, the assertion that the funds resulted from a gift does not end the inquiry. While counsel asserts that the petitioner's father is a successful international businessman, the record does not support that assertion.

EMPLOYMENT CREATION

8 C.F.R. § 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees

have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. § 204.6(e) states, in pertinent part:

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

Full-Time Employment Defined – In this paragraph, the term ‘full-time employment’ means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, CIV-F-99-6117, 19 (E.D. Calif. 2001)(finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a “comprehensive business plan” which demonstrates that “due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.” To be considered comprehensive, a business plan must be sufficiently detailed to permit the Bureau to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho, supra*. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe

the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id. at 213.

Initially, the petitioner submitted a business plan discussing his plans for a gas station with an attached convenience store and Blimpie Subs and Salads restaurant. The plan does not include employment projections. The petitioner also submitted a separate hiring plan asserting that the gas station and "coffee shop" would open in May 2001 and that, if the building permit was obtained by May 2001, the Blimpie would open in August 2001. The petitioner submitted a shift plan for 12 full-time and 4 part-time employees.

The director requested evidence of existing employees and a comprehensive business plan. In response, the petitioner submitted 10 Forms W-2 for 2001, none of which reflect wages of more than a few thousand dollars. The petitioner also submitted payroll records for 12 employees in the first quarter of 2002 reflecting full-time employment for just one employee. In addition, the petitioner submitted page two of a state report for the first quarter of 2002 reflecting eight employees, only two of whom earned wages consistent with full-time employment at minimum wage. Finally, the petitioner asserted that his gas station, convenience store, and Blimpie restaurant required six full-time employees and that by December 2002 he would hire a full-time manager. The petitioner further asserted that the chicken and pizza restaurant would require an additional five employees by December 2002.

The director made no final conclusion as to this requirement. On appeal, counsel asserts that the business plan adequately demonstrates the need for 10 employees. The petitioner submitted photographs of the expansion of the business, 18 Forms I-9, and August payroll records for seven employees with only two showing any salary. Forms I-9 are not evidence that the individuals are currently employed or are employed full time. *Matter of Ho, supra*, at 212. The petitioner's employment projection submitted in response to the director's request for additional documentation called for 10 full-time employees by December 2002. While the appeal was only filed in September 2002, the petitioner did not submit recent wage and withholding statements on appeal. Rather, the petitioner resubmitted the quarterly payroll records for March 2002 and ambiguous payroll records for August 2002. The submitted wage and withholding reports and payroll records do not reflect a steady increase of full-time employees. Rather, they reflect fluctuating employment and few full-time employees. Thus, we cannot conclude that the business plan is credible.



For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

